

FILED
MAR 18 2018
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	*	
	*	
Plaintiff,	*	CRIMINAL NO. 01-17
	*	
v.	*	
	*	
GERMAN MARTINEZ-GUIDO and	*	
MARIA DEL CARMEN	*	
POLANCO-VISOSO	*	
	*	JURY INSTRUCTIONS
Defendants.	*	
	*	

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MEMBERS OF THE JURY, THE COURT NOW GIVES YOU THE FOLLOWING INSTRUCTIONS:

INSTRUCTION NO. 1

INTRODUCTION

Members of the jury, the instructions I gave you at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, *all* instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. 2

DUTY OF JURY

It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

INSTRUCTION NO. 3

EVIDENCE

I have mentioned the word “evidence.” The “evidence” in this case consists of:

- 1) the testimony of witnesses,
- 2) the documents and other things received as exhibits,
- 3) the facts that have been stipulated -- this is, formally agreed to by the parties,
- 4) the facts that have been judicially noticed -- this is, facts which I say you may, but are not required to, accept as true, even without evidence.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

Certain things are not evidence. I shall list those things again for you now:

- 1) Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.
- 2) Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
- 3) Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.
- 4) Anything you saw or heard about this case outside the courtroom is not evidence.

Finally, if you were instructed that some evidence was received for a limited purpose only, you must follow that instruction.

INSTRUCTION NO. 4

DIRECT AND CIRCUMSTANTIAL EVIDENCE

There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence—such as the testimony of an eyewitness. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of a defendant's guilt beyond a reasonable doubt from all of the evidence in the case.

INSTRUCTION NO. 5

CREDIBILITY OF WITNESSES

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

You should judge the testimony of the Defendant in the same manner as you should judge the testimony of any other witness.

INSTRUCTION NO. 6

INDICTMENT

The Indictment in this case charges the defendant, GERMAN MARTINEZ-GUIDO and MARIA DEL CARMEN POLANCO-VISOSO, as follows:

1) Count One charges that on or about March, 1997 and continuing to the present, in the Southern District of Iowa and elsewhere, two or more persons, including the defendants, GERMAN MARTINEZ-GUIDO and MARIA DEL CARMEN POLANCO-VISOSO, did knowingly and intentionally conspire to commit offenses against the United States, specifically to knowingly and intentionally distribute 500 grams or more of a mixture or substance containing methamphetamine, in violation of Title 21, United States Code, Section 846 and 841(b)(1)(A).

2) Count Two charges that on or about February 3, 2001, in the Southern District of Iowa, the defendant, GERMAN MARTINEZ-GUIDO, knowingly and intentionally possessed with the intent to distribute 500 grams or more of a mixture or substance containing methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841 (a)(1), 841 (b)(1)(A), and Title 18, United States Code, Section 2.

The defendants, GERMAN MARTINEZ-GUIDO and MARIA DEL CARMEN POLANCO-VISOSO, have pleaded not guilty to these charges. As I told you at the beginning of the trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, the defendants are presumed to be innocent. Thus the defendants, even though charged, begin the trial with no evidence against them. The presumption of innocence alone is sufficient to find a defendant not guilty and can be overcome only if the Government proves, beyond a reasonable doubt, each essential element of the crime charged. Keep in mind that you must give separate consideration to the evidence about each charge and about each defendant. You must return a

separate verdict on each of the charges against each defendant.

There is no burden upon a defendant to prove that he is innocent. Accordingly, the fact that one of the defendants did not testify must not be considered by you in any way, or even discussed, in arriving at your verdict.

INSTRUCTION NO. 7

DEFINITION OF "ON OR ABOUT"

You will have observed that in the Indictment the phrase "on or about" is used with reference to certain dates. It is not necessary that the government prove that all alleged acts occurred on or within the exact dates set forth in the Indictment. The government need only prove that the act charged in the Indictment occurred within a reasonable time of the dates or over an interval of time that includes the dates.

INSTRUCTION NO. 8

PRESUMPTION OF INNOCENCE

Each defendant is presumed innocent and, therefore, not guilty. This presumption of innocence requires you to put aside all suspicion which might arise from the arrest or charge of a defendant or the fact that he or she is here in court. The presumption of innocence remains with each defendant throughout the trial and alone is sufficient to find him or her not guilty. The presumption of innocence may be overcome only if the prosecution proves, beyond a reasonable doubt, each element of each crime charged against each defendant.

INSTRUCTION NO. 9

ELEMENTS OF THE OFFENSE—COUNT ONE

The crime of conspiracy to distribute a mixture or substance containing methamphetamine, as charged against GERMAN MARTINEZ-GUIDO and MARIA DEL CARMEN POLANCO-VISOSO in Count One of the indictment, has three essential elements, which are:

- 1) Beginning on or about March, 1997 and continuing to the present, in the Southern District of Iowa, two or more persons reached an agreement or came to an understanding to knowingly and intentionally distribute a mixture or substance containing methamphetamine;
- 2) That the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect; and
- 3) That at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding.

For you to find the defendant, GERMAN MARTINEZ-GUIDO guilty of the crime charged under Count One, the government must prove each of these essential elements beyond a reasonable doubt, otherwise you must find the defendant, GERMAN MARTINEZ-GUIDO not guilty of Count One. For you to find the defendant, MARIA DEL-CARMEN POLANCO-VISOSO guilty of the crime charged under Count One, the government must prove each of these essential elements beyond a reasonable doubt, otherwise you must find the defendant, MARIA DEL-CARMEN POLANCO-VISOSO not guilty of Count One.

INSTRUCTION NO. 10

AGREEMENT

In Count One of the Indictment, the crime of conspiracy is charged against the Defendants. The Government must prove that each defendant reached an agreement or understanding with at least one other person. It makes no difference whether that person is a defendant or named in the Indictment.

The “agreement or understanding” need not be an express or formal agreement or be in writing or cover all the details of how it is to be carried out. Nor is it necessary that the members have directly stated between themselves the details or purpose of the scheme.

Mere similarity of conduct among various persons, and the fact that they may have associated with each other and may have assembled together and discussed common aims and interests, does not necessarily prove the existence of a conspiracy.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others, does not prove that a person has joined in an agreement or understanding. A person who has no knowledge of a conspiracy but who happens to act in a way which advances some purpose of one, does not thereby become a member.

But a person may join in an agreement or understanding, as required by this element, without knowing all the details of the agreement or understanding, and without knowing who all the other members are. Further it is not necessary that a person agree to play any particular part in carrying out the agreement or understanding. A person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, as long as that person has an understanding of the unlawful nature of the plan and voluntarily and intentionally joins in it.

You must decide, after considering all of the evidence, whether the conspiracy alleged in Count One of the Indictment existed. The agreement may be inferred from all the circumstances and the conduct of the alleged participants. If you find that the alleged conspiracy did exist, you must also decide whether each defendant voluntarily and intentionally joined the conspiracy, either at the time it was first formed or at some later time while it was still in effect. In making that decision, you must consider only evidence of each defendant's own actions and statements. You may not consider actions and pretrial statements of others, except to the extent that pretrial statements of others describe something that had been said or done by the defendant.

Mere presence at the location of a crime alone, even when coupled with knowledge of the crime, is not sufficient to establish guilt on a conspiracy charge.

INSTRUCTION NO. 11

SUCCESS OF CONSPIRACY NOT REQUIRED

It is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

INSTRUCTION NO. 12

MISCELLANEOUS – CONSPIRACY

To assist you in determining whether there was an “agreement or understanding” to commit the crime of distribution of methamphetamine, you are advised that the elements of the crime of distributing a controlled substance are:

- 1) The intentional delivery of a controlled substance to another person or persons.
- 2) Knowledge by the person delivering the controlled substance that he was delivering a controlled substance of some kind.

Keep in mind that Count One of the indictment charges a *conspiracy* to commit the crime of distribution of a controlled substance; it does not charge that defendant committed the crime of distribution of a controlled substance.

INSTRUCTION NO. 13

ELEMENTS OF THE OFFENSE—COUNT TWO

The crime of knowingly and intentionally possessing with the intent to distribute a mixture or substance containing methamphetamine, as charged against Defendant GERMAN MARTINEZ-GUIDO in Count Two of the indictment, has three essential elements, which are:

- 1) The defendant was in possession of a mixture or substance containing methamphetamine on or about February 3, 2001;
- 2) The defendant knew that he was in possession of a mixture or substance containing methamphetamine; and
- 3) The defendant intended to distribute some or all of the mixture or substance containing methamphetamine to another person.

For you to find the Defendant, GERMAN MARTINEZ-GUIDO, guilty of the crime charged in Count Two, the government must prove these three essential elements beyond a reasonable doubt; otherwise you must find the Defendant, GERMAN MARTINEZ-GUIDO not guilty of Count Two.

INSTRUCTION NO. 14

POSSESSION: ACTUAL, CONSTRUCTIVE, SOLE, JOINT

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession.

A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

Whenever the word "possession" has been used in these instructions it includes actual as well as constructive possession and also sole as well as joint possession.

INSTRUCTION NO. 15

AIDING AND ABETTING

With respect to Count Two, Defendant GERMAN MARTINEZ-GUIDO may also be found guilty of possessing with the intent to distribute a controlled substance even if he personally did not do every act constituting the offense charged, if he aided and abetted the commission of possession with the intent to distribute a controlled substance.

In order to have aided and abetted the commission of a crime a person must, before or at the time the crime was committed:

(1) have known the crime of possession with the intent to distribute a controlled substance was being committed or going to be committed;

(2) have knowingly acted in some way for the purpose of causing, encouraging, or aiding the commission of possession with the intent to distribute a controlled substance.

For you to find the defendant, GERMAN MARTINEZ-GUIDO guilty of possession with the intent to distribute a controlled substance by reason of aiding and abetting, the Government must prove beyond a reasonable doubt that all of the essential elements of possession with the intent to distribute a controlled substance were committed by some person or persons and that the defendant aided and abetted the commission of that crime.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others, does not prove that a person has become an aider and abettor. A person who has no knowledge that a crime is being committed or about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

INSTRUCTION NO. 16

PROOF OF INTENT OR KNOWLEDGE

Intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant, and all the facts and circumstances in evidence which may aid in a determination of defendant's knowledge or intent.

You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

INSTRUCTION NO. 17

REASONABLE DOUBT

A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

INSTRUCTION NO. 18

CONSPIRACY: CO-CONSPIRATOR ACTS AND STATEMENTS

You may consider acts knowingly done and statements knowingly made by a defendant's co-conspirators during the existence of the conspiracy and in furtherance of it as evidence pertaining to a defendant even though they were done or made in the absence of and without the knowledge of a defendant. This includes acts done or statements made before a defendant had joined the conspiracy, for a person who knowingly, voluntarily and intentionally joins an existing conspiracy is responsible for all of the conduct of the co-conspirators from the beginning of the conspiracy.

Acts and statements which are made before the conspiracy began or after it ended are admissible only against the person making them and should not be considered by you against any other defendant.

INSTRUCTION NO. 19

STATUTE

Title 21, United States Code, Section 841(a)(1), provides in pertinent part that:

It shall be unlawful for any person knowingly or intentionally to . .
. . possess with intent to. . . distribute . . . a controlled substance.

The term “distribute” means to deliver . . . a controlled substance.

The term “deliver” means the actual, constructive or attempt to
transfer of a controlled substance and includes a “sale.”

Methamphetamine is a Schedule II controlled substance under the
laws of the United States.

Title 21, United States Code, Section 846, provides in pertinent part that:

Any person who ... conspires to commit any offense ... shall be
subject to the same penalties as those prescribed for the offense,
the commission of which was the object of the conspiracy.

INSTRUCTION NO. 20

TESTIMONY UNDER GRANT OF IMMUNITY OR PLEA BARGAIN

You have heard evidence that certain witnesses have entered into a plea agreement or agreements with the Government. These agreement contain various provisions, including a substantial assistance provision, wherein the witness hopes to have his or her sentence reduced as a reward for cooperation with the government and testifying in this case. Such witness testimony was received in evidence and may be considered by you. You may give each witness's testimony such weight as you think it deserves. Whether or not each witness's testimony may have been influenced by the plea agreement or Government's promise is for you to determine.

The witness' guilty pleas cannot be considered by you as any evidence of this defendant's guilt. The witness' guilty pleas can be considered by you only for the purpose of determining how much, if at all, to rely upon the witness's testimony.

In regard to evidence that certain government witnesses hope to receive a reduced sentence, I will now explain to you what the sentencing laws of the United States provide in respect to reducing a sentence. A sentence can be reduced below what it would otherwise have to be under the law to reflect any substantial assistance the sentenced person provides in the investigation or prosecution of another person who has committed a crime. The judge has no power to reduce a sentence for substantial assistance, however, unless the government, acting through the United States Attorney, files a motion to reduce the sentence for substantial assistance. If such a motion for reduction of sentence for substantial assistance is filed by the government, it is then up to the judge whether to reduce the sentence at all, and if he does, how much to reduce it.

INSTRUCTION NO. 21

ELECTION OF A FOREPERSON/DUTY TO DELIBERATE

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict - whether guilty or not guilty - must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict.

Third, if the defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the Government has proved its case beyond a reasonable doubt.

Fourth, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or bailiff, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone - including me - how your votes stand numerically.

Fifth, your verdict must be based solely on the evidence and on the law which I have

given to you in my instructions. The verdict whether guilty or not guilty must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be - that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. [The form reads: (read form)]. You will take this form to the jury room, and when each of you has agreed on the verdicts, your foreperson will fill in the form, sign and date it, and advise the marshal or court security officer that you are ready to return to the courtroom.

12/5/2001
DATE

Robert W. Pratt
ROBERT W. PRATT, JUDGE
UNITED STATES DISTRICT COURT